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Supreme Court of the United States

October Term, 1979

No. 79-327

CBS INC.

Petitioner,

v.

UNITED STATES OF AMERICA and
NATIONAL BROADCASTING COMPANY, INC.,

Respondents.

No. 79-354

COLUMBIA PICTURES INDUSTRIES, INC., et al.,

Petitioners,

v.

UNITED STATES OF AMERICA and
NATIONAL BROADCASTING COMPANY, INC.,

Respondents.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR RESPONDENT NATIONAL BROADCASTING COMPANY, INC. IN OPPOSITION.

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OPINIONS BELOW.

The Memorandum of Decision and Order of the United States District Court for the Central District of California, entered on June 20, 1977, denying CBS's motion to intervene pursuant to Fed. R. Civ. P. 24 is unreported and is set forth in the CBS Appendix at A-9. The Order of the District Court, entered on November 30, 1977, denying CPI's motion to intervene also is unreported and is set forth in the CPI Appendix at 37a.

The Opinion of the United States Court of Appeals for the Ninth Circuit affirming the denial of petitioners' motions to intervene was entered on June 4, 1979, and has not been reported. It is set forth at CBS Appendix A-18 and CPI Appendix 76a.

JURISDICTION.

The judgment of the United States Court of Appeals for the Ninth Circuit affirming the denial of petitioners' motions to intervene was entered on June 4, 1979. The CBS petition for certiorari was filed on August 28, 1979 and the CPI petition for certiorari was filed on September 4, 1979. Petitioners invoke this Court's jurisdiction under 28 U. S. C. § 1254(1).

RULE INVOLVED.

Although petitioners attempt to create an issue of interpretation under the Antitrust Procedures and Penalties Act, 15 U. S. C. § 16, this case involves only the denial of petitioners' motions to intervene under Fed. R. Civ. P. 24.

QUESTIONS PRESENTED.

Whether petitioners' motions to intervene as of right were properly denied because petitioners failed to meet the specific requirements of Fed. R. Civ. P. 24(a)(2); and whether denial of petitioners' motions for permissive intervention were abusive of the District Court's discretion under Fed. R. Civ. P. 24(b)(2).

STATEMENT OF THE CASE.

National Broadcasting Company, Inc. ("NBC") files this brief in opposition to the petitions for writ of certiorari filed by petitioners, CBS Inc. ("CBS") and Columbia Pictures Industries, Inc. et al. ("CPI"). Both petitioners challenge the order of the United States Court of Appeals for the Ninth Circuit which affirmed the District Court's denial of petitioners' motions to intervene in proceedings in which the District Court approved a Final Judgment (generally referred to herein as "the Consent Decree") terminating **United States v. National Broadcasting Company, Inc.**, Civ. No. 74-3601-RJK (C.D. Cal.).

The Consent Decree at issue settled an antitrust action commenced by the United States against NBC in December, 1974. Petitioners were not parties to this lawsuit; however, at the same time that the Government filed its action against NBC, it filed virtually identical actions against CBS and American Broadcasting Companies, Inc. ("ABC"), the other two major commercial television networks. **United States v. CBS Inc.**, Civ. No. 74-3599-RJK (C. D. Cal.); **United States v. American Broadcasting Cos.**, Civ. No. 74-3600-RJK (C. D. Cal.).

In the course of the litigation, NBC and the Government entered into settlement negotiations and were able to reach agreement on a Consent Decree which was submitted to the District Court for approval on November 17, 1977. ABC and CBS, however, did not negotiate or agree to a consent decree and the respective actions against them are now proceeding to trial.

In order to reach settlement, NBC agreed to accept various injunctive restrictions principally dealing with NBC's own production of programs and NBC's acquisition of program rights from suppliers such as CPI. However, nothing in the NBC Consent Decree restricts CPI, which remains free to negotiate for different terms than those provided by the Consent Decree in contracts with NBC, or with ABC or CBS. Likewise, nothing in the Consent Decree restricts CBS, which remains entirely free to produce its own programs and to negotiate any terms it desires with its program suppliers.[1] CBS, of course, is also free to litigate the parallel antitrust suit brought against it by the Government—a suit which CBS is now vigorously defending.

Pursuant to the Antitrust Procedures and Penalties Act ("APPA"), 15 U. S. C. § 16, the Government caused the proposed Consent Decree and a Competitive Impact

1. Additionally, in negotiating the Consent Decree, the Government recognized that it would be unfair to place NBC "at a competitive disadvantage with respect to CBS or ABC. . . ." (Competitive Impact Statement, at 13; *see* 41 Fed. Reg. 52015 (1976)). Thus, the restrictions on NBC's production and most of the restrictions on the terms that NBC may include in its contracts with program suppliers do not take effect unless and until similar restrictions are placed on ABC and CBS as a result of a consent decree or of a ruling by the District Court in favor of the Government upon completion of the respective cases against them.

Statement to be published in the Federal Register on November 24, 1976 (41 Fed. Reg. 51992 (1976)); it also caused a summary of the proposed Consent Decree and Competitive Impact Statement to be published in appropriate newspapers of general circulation during the period November 29-December 5, 1976. No claim is made that there was any lack of compliance with these requirements.

Following the procedures under the APPA, 15 U. S. C. § 16(d), numerous Comments regarding the Consent Decree were received and considered. CBS provided the District Court with a filing of over 150 pages, consisting of a 47 page set of Comments and six appendices totalling an additional 107 pages, including extensive affidavits from a professor of economics and from a professor of law specializing in antitrust law. CPI likewise filed a 52 page set of Comments.

In the District Court, and indeed in every proceeding since, CPI argued that the Consent Decree was inconsistent with the antitrust laws because it did not sufficiently restrict NBC. Conversely, CBS argued that the Consent Decree was inconsistent with the antitrust laws because it restricted NBC too much.

In addition to filing Comments, petitioners also moved to intervene in the District Court, relying essentially on the same arguments made in the Comments which they already had submitted. Indeed, CBS appended its Comments to its memorandum in support of its intervention motion; and CPI filed a memorandum in support of its motion that virtually tracked its Comments.

On June 20, 1977, the District Court denied the CBS motion to intervene, holding that:

> —CBS lacked the requisite interest to intervene because, *inter alia,* the Consent Decree placed no restrictions on CBS;
>
> —Any interest CBS might have would not be impaired, in light of CBS's ability to defend its parallel lawsuit and in light of the provision of the settlement which provided that many paragraphs of the NBC Consent Decree, including those most objected to by CBS, would not become effective unless the Government obtained similar remedies against CBS.[2]

(Memorandum of Decision and Order, June 20, 1977, at 7-8) (CBS App. A-9).

After the parties had reviewed the Comments and after further discussions between them, on May 4, 1977, the Government and NBC filed a stipulation and proposed order modifying the proposed Final Judgment.[3] On May 17, 1977, the Government filed a Certificate of Compliance with the provisions of the APPA.

On November 23, 1977, the District Court signed the proposed Consent Decree and on November 28, 1977, the

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2. See note 1, *supra,* p. 3.

3. The May 4, 1977 stipulation deleted a provision dealing with pay cable and modified a provision dealing with pilots. In addition, the parties entered into a stipulation concerning talent and literary exclusivity arrangements, which were not and are not covered by the proposed Final Judgment, and agreed that the May 4 stipulation would not create an estoppel as to the subject matter of the deleted pay cable provision or as to talent and literary exclusivity. These modifications were explained by the Government in the Memorandum of the United States Submitting Comments and Plaintiff's Responses Relating to the Final Judgment and Explaining Certain Changes in the Judgment, filed May 4, 1977 and published in the Federal Register on May 16, 1977 (42 Fed. Reg. 24995 (1977)).

Final Judgment was entered. The Court's opinion explaining its actions was filed on January 26, 1978 and entered on January 27, 1978. (CPI App. 38a).

In approving the Consent Decree, the District Court pointed out that the persons contesting the settlement, including CBS and CPI, had taken conflicting positions which the Court had considered "in light of the special interest of the respective proponents thereof." (CPI App. 64a).[4] This fragmented opposition to the settlement—the terms of which fell between the polarized positions of the commenting persons—and the fact that the Consent Decree was consistent with the relief sought in the Complaint (CPI App. 73a) were among the factors which persuaded the District Court to approve the Consent Decree.

Making clear that it had carefully considered all the extensive filings, including those of CBS and CPI, the District Court concluded that, under the discretion explicitly afforded by the APPA, it could approve the Consent Decree without the need for a hearing or other optional procedures. (CPI App. 68a-69a). On November 30, 1977, the District Court denied the CPI motion to intervene. (CPI App. 37a).

On December 20, 1977, CBS filed a petition for a writ of mandamus in the United States Court of Appeals for the Ninth Circuit. This petition essentially tracked the arguments which CBS had made in three other places: in its motion for summary judgment filed in its own continuing litigation;[5] in its Comments on the Consent Decree; and in its motion to intervene. The petition for mandamus was denied on April 12, 1978, and rehearing was denied on February 5, 1979. CBS filed a petition for certiorari seeking review of that decision on May 7, 1979. This Court denied the petition on October 1, 1979.

4. As noted, CPI maintains that the Consent Decree is not restrictive enough, while CBS maintains that the Decree is overly restrictive.

At the same time that CBS was attacking the Consent Decree via mandamus, both CBS and CPI embarked on another tack of opposition by appealing from the District Court's denial of intervention. After oral argument, on June 4, 1979 the Court of Appeals for the Ninth Circuit affirmed the orders of the District Court denying petitioners' motions to intervene. (CBS App. A-18; CPI App. 76a). The Court of Appeals held that as to intervention of right under Fed. R. Civ. P. 24(a)(2), petitioners had not made the requisite showing that their interests were not "adequately represented" by the Government. The Court therefore did not reach respondents' arguments that petitioners also had failed to satisfy the other requirements of the Rule. The Court also held that the District Court's decision to deny permissive intervention under Rule 24(b)(2) was not an abuse of discretion.

CBS again filed a petition for certiorari and CPI did likewise.[6] Because both petitions raise the same issues, we shall respond to both in this Brief in Opposition.

5. This motion was denied by the District Court on February 9, 1977. (Memorandum of Decision and Order, February 16, 1977).

6. CBS, by letter dated August 28, 1979, requested this Court to "consider [its] two petitions for certiorari together . . . because both petitions arise from the same litigation and involve important issues relating to the proper interpretation and enforcement of the Antitrust Procedures and Penalties Act, 15 U. S. C. § 16(b)-(h)." Denial of the first CBS petition of course mooted this request.

ARGUMENT.

I. No Question Warranting Review Is Presented Concerning Interpretation of the APPA.

Both petitioners attempt to create the impression that this case involves a unique and novel question concerning an interpretation of the APPA.[7] This is not so. The only issues in the present petitions are narrow and typical questions concerning intervention of right and permissive intervention under Fed. R. Civ. P. 24. In resolving these questions, the courts below properly held that petitioners had failed to meet the very specific requirements for intervention under Rule 24, requirements which must be fulfilled regardless of whether the lawsuit in which a person wishes to intervene falls under the APPA.

The intent of Congress in passing the APPA was to create the equivalent of a "sunshine law" for consent decree approval proceedings. Senator John Tunney, one of the bill's sponsors, stated that it was his expectation that "the consent decree process will be opened up to significant public scrutiny, and judges will take a more active role in assessing the worth of proposed judgments." (120 Cong. Rec. 38585 (1974)).[8]

7. Petitioners here argue the same points CBS made in its first petition for certiorari, denied by the Court on October 1, 1979.

8. There is no indication that Congress intended to alter the long standing rule explicitly stated by this Court in **Sam Fox Publishing Co. v. United States**, 366 U. S. 683, 689 (1961), that:

> "[S]ound policy would strongly lead us to decline . . . to assess the wisdom of the Government's judgment in negotiating and accepting the . . . consent decree, at least in the absence of any claim of bad faith or malfeasance on the part of the Government in so acting."

Accordingly, under the APPA, after a proposed final judgment is submitted to the Court, the Department of Justice must give thorough notice of the Decree and must provide a Competitive Impact Statement fully discussing the provisions of the Decree and the Department's decision to agree to them. 15 U. S. C. § 16(b), (c).

It is undisputed that this was done here. The scrutiny was undeniably a full one. As noted above, petitioners made extensive use of the opportunity to file Comments and affidavits in which they provided the District Court with lengthy arguments virtually identical to those relied upon in support of their motions to intervene.

Although the APPA provides that a District Court *may* allow participation in consist decree proceedings by intervenors, 15 U. S. C. § 16(f)(3), the matter quite clearly is discretionary with the District Court. Moreover, the statutory history makes clear that Congress believed that the comment procedure—so fully utilized in the present case—generally obviated any need for the highly unusual step of intervention by a private party in a Government consent decree proceeding, with its potential for delay and confusion. During Congressional consideration of the proposed Act, the Department of Justice had expressed explicit concern over interventions, observing that a permissive intervention procedure would create "considerable likelihood that substantial resources of the Antitrust Division will be tied up in judicial hearings throughout the country looking into the 'public impact' of consent decrees we file." (Letter from Assistant Attorney General Thomas Kauper to Senator Jacob Javits dated July 12, 1974, 119 Cong. Rec. 24601 (1973)).

As a result, Senator John Tunney made specific the intention of the Senate Judiciary Committee with the following statement on the floor of the Senate:

> "There should also be no misunderstanding about the intent of the bill with respect to potential private plaintiffs. We do not seek to open the floodgates to litigation, nor has anyone argued that the bill, in its final version and as it was endorsed by all members of the Judiciary Committee, would do so. Provision 2(f)(3) [15 U. S. C. § 16(f)(3)], which provides that a court may authorize participation in its proceedings upon a proposed consent decree by interested persons or agencies, *is not intended to broaden the existing right of intervention.*" 119 Cong. Rec. 24599 (1973) (emphasis added).[9]

9. By this statement, Senator Tunney amplified the intention of the Judiciary Committee that:

> "It is not the intent of the Committee to compel a hearing or trial on the public interest issue. *It is anticipated that the trial judge will adduce the necessary information through the least complicated and least time-consuming means possible.* Where the public interest can be meaningfully evaluated simply on the basis of briefs and oral arguments, this is the approach that should be utilized. Only where it is imperative that the court should resort to calling witnesses for the purpose of eliciting additional facts should it do so.
>
> Nor is Section 2(e) intended to force the government to go to trial for the benefit of potential private plaintiffs . . ." S. Rep. No. 93-298, 93d Cong., 2d Sess. 6 (1973) (emphasis supplied).

The same concerns are set forth in the House Report. The Report quotes the language of the Senate Report with respect to the preservation of the consent decree as a viable settlement option and states that section 2(f) [section 16(f)] is not "intended to authorize techniques not otherwise authorized by law." H. R. Rep. No. 93-1463, 93d Cong., 2d Sess. 9, *reprinted in* [1974] U. S. Code Cong. & Ad. News 6535, 6539. On the floor, the bill's manager, Rep. John Seiberling, made clear that no extension of intervenors' rights was intended:

> "[T]he bill expressly provides that while the court does not have any mandatory requirement to make further inquiries, it has the specific authority to do so, *an authority which it now has under its general equity powers* but which is spelled out in the proposed legislation along with some explicit statutory guidelines." 120 Cong. Rec. 36342 (1974) (emphasis added).

In similar terms Rep. Barbara Jordon emphasized that:

> "It is not the intention of the committee to require the courts to conduct a hearing or trial on the public interest question. *It is anticipated that the trial judge will adduce the necessary information through the least complicated and least time-consuming means possible.*" 120 Cong. Rec. 36344 (1974) (emphasis added).

In sum, the Congressional history makes evident that the main purpose of the APPA was "to encourage additional comments and response by more adequate notice to the public," without the need for interventions, with all of the attendant problems, complexities and delays that such interventions inevitably involve. S. Rep. No. 93-298, 93d Cong., 2d Sess. 5 (1973). Indeed, the present case shows how well the statute works without the need for judicial modification, for petitioners were able to provide the District Court with extensive Comments concerning the NBC Consent Decree even though, as discussed below, petitioners were unable to meet the specific standards for intervention which remain unchanged after passage of the APPA.

9. (Cont'd.)

II. The Motions for Intervention Were Properly Denied.

A. Petitioners Have No Right To Intervene Under Fed. R. Civ. P. 24(a)(2).

Petitioners here cannot meet any of the standard requirements for intervention of right under Fed. R. Civ. P. 24(a)(2).[10] To prevail, petitioners must show:

(1) a specific interest relating to the subject of the action in which intervention is requested; and

(2) impairment or impeding of the ability to protect that interest; and

(3) lack of adequate representation of that interest by existing parties.

The first requirement is not met because petitioners lack the requisite interest. The Consent Decree governs only NBC. It imposes certain limitations upon NBC regarding contractual terms, in-house production, options, and exclusivity. However, there is no limitation upon suppliers such as CPI, or upon CBS. Both are free to negotiate whatever terms they desire.

CPI's claimed interest is that it would like the Decree to guarantee it even greater benefits. CBS's alleged interest, on the other hand, is derived from its view of business opportunities. It claims that the Decree regulates contract terms between NBC and suppliers to the benefit of the suppliers and limits the amount of product which NBC can produce on its own, and that this allegedly results in some sort of residual impact on the general market in which CBS competes.

10. Under Fed. R. Civ. P. 24(a)(2), a right to intervene exists only

> "when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties."

Neither petitioner thus shows an interest sufficient for intervention under Rule 24(a)(2). The CPI claim that it would like the Decree to do even more for it is a contention which, if sufficient under Rule 24(a)(2), would provide intervention of right for any person who might benefit under a consent decree and who would like to increase the benefits. Likewise, the CBS claim, aimed at preserving general business opportunities related to competition, does not constitute the "*direct and visible injury* to itself" which a person must show for intervention under Rule 24(a)(2). **United States v. CIBA Corp.,** 50 F. R. D. 507, 513 (S. D. N. Y. 1970) (emphasis added); *see* **Allen Calculators, Inc. v. National Cash Register Co.,** 322 U. S. 137 (1944); **Utah v. American Pipe & Construction Co.,** 50 F. R. D. 99, 102 (C. D. Cal. 1970), *modified on other grounds,* 473 F. 2d 580 (9th Cir. 1973), *aff'd,* 414 U. S. 538 (1974); **United States v. Blue Chip Stamp Co.,** 272 F. Supp. 432 (C. D. Cal. 1967), *aff'd sub nom.* **Thrifty Shoppers Scrip Co. v. United States,** 389 U. S. 580 (1968).

The second requirement under Rule 24(a)(2) also is not met by petitioners, since they fail to show that any interests which they might have were impaired or impeded by the NBC Consent Decree. For this reason alone, petitioners fail to meet the requirements of Rule 24(a)(2). *See* **Sam Fox Publishing Co. v. United States,** 366 U. S. 683, 689 (1961); **United States v. CIBA Corp.,** *supra,* 50 F. R. D. at 513; **Utah v. American Pipe & Construction Co.,** *supra,* 50 F. R. D. at 102; **United States v. Blue Chip Stamp Co.,** *supra,* 272 F. Supp. at 438.

As to CPI, it is unrestricted by the Consent Decree in its negotiations or in pursuit of its remedies. In fact, CPI and other program suppliers already have outstanding antitrust suits against ABC and CBS (*see* **Columbia Pictures Industries, Inc. v. American Broadcasting Cos.,** 1974-1 Trade Cas. ¶ 74,912 (S. D. N. Y.), *aff'd,* 501 F. 2d 894 (2d Cir. 1974)), raising issues involving network program production and acquisition. Additionally, in a pending proceeding before the Federal Communications Commission, program suppliers, including CPI, made virtually the same arguments that they have made in this Court and in the courts below concerning the various subjects dealt with in the NBC Consent Decree—renewal options, exclusivity, spin-offs, network facilities use, and network production of programs (*see* Comments of Motion Picture Association of America et al. in FCC Docket No. 21049 (June 1, 1977)).

As to CBS, it is free to litigate, and is currently litigating, the parallel antitrust suit brought against it by the Government. Until that suit is resolved, most of the provisions of the NBC Consent Decree (including those that are the basis of the CBS objections) do not take effect. In the interim, CBS is free to negotiate its own deals with suppliers as it has in the past.[11]

11. CBS argues that NBC, in anticipation of the Consent Decree's effective date, may implement provisions of the Decree before it is obligated to do so, thus creating new industry-wide standards. NBC, of course, is free to change the terms it negotiates in the ways suggested by CBS, with or without a consent decree; but whether it actually might do so is sheer speculation. Moreover, regardless of NBC's actions, CBS would be under no obligation to follow NBC's lead. In any event, this hardly constitutes the impairment of an interest necessary to sustain intervention.

CBS also argues that somehow it is prejudiced because the suit which CBS currently is litigating is before the District Judge who approved the NBC Consent Decree. This argument ignores the fact that courts can and regularly do approve settlements for one or more multiple defendants while litigation with other defendants continues. It is equally clear that a court's decision on one issue (such as whether to approve a settlement between the Government and NBC) has no *stare decisis* effect on a different issue (such as whether the Government can prevail on the merits against CBS) and does not warrant intervention. *See* **Blake v. Pallan,** 554 F. 2d 947, 954 (9th Cir. 1977). Moreover, the Decree itself, in its preamble, provides that it cannot be used in any other litigation.

The third requirement under Rule 24(a)(2) likewise is unmet because petitioners fail to show that their interests were not adequately protected by the parties.

CPI's position amounts to nothing more than the claim that the Government did not adequately represent CPI's interests because CPI disagrees with the Government's ultimate resolution of the case. Were this sufficient, courts would be required to find "inadequate representation" in every case where there was a private party who was dissatisfied with a consent decree negotiated by the Government. CPI's contention, of course, ignores the longstanding rule stated by this Court in upholding the denial of intervention in **Sam Fox Publishing Co. v. United States,** 366 U. S. 683, 689 (1961), that:

> "[S]ound policy would strongly lead us to decline appellants' invitation to assess the wisdom of the Government's judgment in negotiating and accepting the . . . consent decree, at least in the absence of any

claim of bad faith or malfeasance on the part of the Government in so acting." [12]

CBS, on the other hand, claims that the Government could not adequately protect its interests largely because the Government is litigating a parallel antitrust suit against CBS. But to the extent this is a problem for CBS, CBS is fully able to resolve it by actively litigating its own lawsuit. This is exactly what CBS is doing, and intervention in the NBC case was unnecessary.

Both petitioners rely on **Cascade Natural Gas Corp. v. El Paso Natural Gas Co.**, 386 U. S. 129 (1967), which is inapposite. In **Cascade**, this Court had directed the District Court to order the divestiture without delay of a company acquired in violation of Section 7 of the Clayton Act. Almost three years later, when the case next reached the Supreme Court, divestiture had not been directed; instead, the District Court had approved a settlement flatly inconsistent with the Supreme Court's mandate. Under these peculiar circumstances, the Court held that inter-

12. Consistent with the Supreme Court's statement in **Sam Fox**, courts have required a showing of bad faith or malfeasance on the part of the Government in order to find inadequate representation warranting intervention in connection with a consent decree negotiated by the Government. *See* **United States v. Associated Milk Producers, Inc.**, 394 F. Supp. 29, 41 (W. D. Mo. 1975), *aff'd*, 534 F. 2d 113, 117 (8th Cir.), *cert. denied*, 429 U. S. 940 (1976); **United States v. IT&T**, 349 F. Supp. 22 (D. Conn. 1972), *aff'd sub nom.* **Nader v. United States**, 410 U. S. 919 (1973); **United States v. Paramount Pictures, Inc.**, 333 F. Supp. 1100 (S. D. N. Y.), *aff'd sub nom.* **Syufy Enterprises v. United States**, 404 U. S. 802 (1971); **United States v. CIBA Corp.**, 50 F. R. D. 507, 513 (S. D. N. Y. 1970); **United States v. Blue Chip Stamp Co.**, 272 F. Supp. 432 (C. D. Cal. 1967), *aff'd sub nom.* **Thrifty Shoppers Scrip Co. v. United States**, 389 U. S. 580 (1968). Here, the CPI appellants do not contend that the Government acted with the "bad faith or malfeasance" necessary to warrant intervention.

vention should have been granted, noting that the Government improperly had "knuckled under" to the defendants and had attempted to modify the Supreme Court's already existing mandate. 386 U. S. at 141, 136. Here—where the Government negotiated a settlement which, as petitioners make clear, falls in between their respective extreme positions—the facts do not even remotely resemble those presented by **Cascade. Cascade's** unique circumstances thus provide no support for petitioners' contentions.

B. The District Court Acted Within Its Broad Discretion in Denying Permissive Intervention Under Fed. R. Civ. P. 24(b)(2).

The District Court also properly denied petitioners' motions for permissive intervention under Fed. R. Civ. P. 24(b)(2).[13]

The granting of permissive intervention under Rule 24(b)(2) "by definition, lies in the discretion of the trial court . . . ." 3B **Moore's Federal Practice** ¶ 24.10[4], at 24,391 (2d ed. 1979). The discretionary denial of permissive intervention is "not reviewable by an appellate court unless clear abuse is shown . . . ." **Allen Calculators, Inc. v. National Cash Register Co.**, 322 U. S. 137, 142 (1944).

13. Rule 24(b)(2) provides in pertinent part that permissive intervention may be granted

> "when an applicant's claim or defense and the main action have a question of law or fact in common . . . . In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties."

The District Court's denial of intervention in this case clearly was a proper exercise of its discretion. In light of the full use by petitioners of the opportunities to state their views under the APPA procedures, including the filing of extensive Comments which were substantially identical to the papers filed in support of intervention, and the unrestricted ability of petitioners to protect their own remedies, the District Court's decision denying permissive intervention hardly can be deemed an abuse of the Court's discretion.

Courts traditionally have refused permissive intervention in antitrust cases for four reasons, each of which is pertinent here.

First, where the applicant claims, as the petitioners do here, to have a business interest in competition, its interest is viewed as substantially identical with and represented by the Government and therefore not recognizable as grounds for intervention.[14] *See* **United States v. Associated Milk Producers, Inc.**, 534 F. 2d 113 (8th Cir.), *cert. denied*, 429 U. S. 940 (1976); **United States v. Blue Chip Stamp Co.**, 272 F. Supp. 432 (C. D. Cal. 1967), *aff'd sub nom.* **Thrifty Shoppers Scrip Co. v. United States,** 389 U. S. 580 (1968).

Second, intervention is denied where it would result in the addition of numerous litigants to a Government's suit, making the management of the case far more time-consuming and perhaps even impossible.[15] *See* **Allen**

14. Also see discussion, *supra*, pp. 12-13.

15. CBS argues that "the concern that CBS's participation as a party would unduly complicate or delay the judicial public interest determination is no proper basis for denial of intervention."

Calculators, Inc. v. National Cash Register Co., 322 U. S. 137, 141-42 (1944); **United States v. Paramount Pictures, Inc.**, 333 F. Supp. 1100 (S. D. N. Y.), *aff'd sub nom.* **Syufy Enterprises v. United States,** 404 U. S. 802 (1971); **United States v. Aluminum Co. of America,** 41 F. R. D. 342 (E. D. Mo. 1967), *appeal dismissed,* 388 U. S. 457 (1967); **United States v. Blue Chip Stamp Co.**, 272 F. Supp. 432 (C. D. Cal. 1967); *aff'd sub nom.* **Thrifty Shoppers Scrip Co. v. United States,** 389 U. S. 580 (1968); **United States v. Loew's Inc.**, 20 F. R. D. 423 (S. D. N. Y. 1957).

Third, consent judgments are regarded as central to the administration and enforcement of the antitrust laws, and intervention is particularly suspect where intended to defeat the entry of a consent judgment. *See* **United States v. National Bank & Trust Co.**, 319 F. Supp. 930 (E.D. Pa. 1970); **United States v. Atlantic Richfield Co.**, 50 F. R. D. 369 (S. D. N. Y. 1970); **United States v. Automobile Manufacturers Association,** 307 F. Supp. 617 (C. D. Cal. 1969), *aff'd sub nom.* **City of New York v. United States,** 397 U. S. 248 (1970).

15. (Cont'd.)
(CBS Petition, at 24). This argument of CBS is difficult to comprehend in light of the explicit language of Rule 24(b)(2) that:

> "In exercising its discretion the court shall consider whether the intervention *will unduly delay or prejudice* the adjudication of the rights of the original parties." (emphasis added).

The concern of Rule 24(b)(2) for delay and complication is particularly appropriate in a case under the APPA, which provides persons such as the present petitioners with ample opportunity to make their views known *without* intervention, and which provides the district court with the opportunity to utilize, in its discretion, various procedures to obtain information about the consent decree at issue. Whether or not such procedures were utilized is, contrary to CBS's suggestion, irrelevant to the question of intervention. As noted above, see pp. 8-11, *supra*, the rules and standards for determining the appropriateness of intervention remain unchanged by the passage and application of the APPA.

Fourth, where a consent decree does not restrict an applicant's remedies, discretion is generally exercised against intervention. *See* **United States v. Blue Chip Stamp Co.,** 272 F. Supp. 432 (C. D. Cal. 1967), *aff'd sub nom.* **Thrifty Shoppers Scrip Co. v. United States,** 389 U. S. 580 (1968); **United States v. Bendix Home Appliances, Inc.,** 10 F. R. D. 73 (S. D. N. Y. 1949). CBS, of course, is vigorously defending its own lawsuit, and CPI is pursuing its remedies in private suits and administrative proceedings.[16] Thus, as a discretionary matter, the District Court had no compelling reason for complicating the litigation by allowing intervenors to attempt to litigate their private positions in the Consent Decree proceedings.

16. See p. 14, *supra.*

CONCLUSION.

For the foregoing reasons, the petitions for writs of certiorari should be denied.

Respectfully submitted,

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